2001

Enid Cosgriff Murphy v. Michael Edward Murphy : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ENID COSGRIFF MURPHY,
Plaintiff-Respondent,

vs.

MICHAEL EDWARD MURPHY,
Defendant-Appellant.

Case No.
13748

BRIEF OF APPELLANT

**Appeal From the Judgment of the
Third District Court for Salt Lake County
Honorable Peter Leary, Judge**

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STATEMENT OF THE KIND OF CASE

This is a divorce action.

DISPOSITION IN THE LOWER COURT

The case was tried to the Court. The District Court awarded Enid Cosgriff Murphy the divorce and her property that she had brought into the marriage. The Court awarded Michael Edward Murphy the sums obtained from the sale of a farm in Minnesota

and directed that Enid Cosgriff Murphy return to Michael Edward Murphy, without payment, Michael Edward Murphy's note payable to Enid Cosgriff Murphy in the amount of $22,500.00 but failed to require Enid Cosgriff Murphy to contribute to or share in the disastrous financial losses incurred during the course of the marriage.

RELIEF SOUGHT ON APPEAL

Michael Edward Murphy seeks on this appeal,

a) A modification of the trial court's Decree of Divorce to require Enid Cosgriff Murphy to contribute equally to the financial losses sustained during the course of the marriage (based on the evidence received by the Court), and

b) To remand the case to the District Court with the requirement that the trial court receive evidence as to what would be the appreciated value of assets brought into the marriage by Michael Edward Murphy in order to determine his actual financial loss during the course of the marriage, and to require Enid Cosgriff Murphy to contribute equally to this increment of loss, and

c) To order that the pleadings, i.e. the prayer of the Complaint, be amended to conform to the evidence setting forth a demand for an equitable contribution on the part of Enid Cosgriff Murphy to the financial losses of the parties.

d) To reverse the trial court and award the Decree of Divorce to Michael Edward Murphy, or in the alternative, to award him a Decree of Divorce as well as to Enid Cosgriff Murphy.

IDENTIFICATION OF THE PARTIES AND EXPLANATION OF ABBREVIATIONS

Michael Edward Murphy, the Defendant and Appellant, will hereinafter be referred to as the Defendant or where appropriate, by his name. Enid Cosgriff Murphy, the Plaintiff and Respondent, will hereinafter be referred to as the Plaintiff, or where appropriate, by her name.

"R" refers to a page reference in the record of the case and "T" refers to a page reference in the transcript of the trial case.

STATEMENT OF FACTS

Enid Cosgriff Murphy brought an action for divorce against Michael Edward Murphy alleging mental cruelty (R-1). She initially sought a decree granting her the divorce (R-2). Subsequently, she also sought a property settlement granting to each party his respective funds (R-56-60). Michael Edward Murphy counterclaimed and sought a divorce in his own right (R-4). At the trial, he urged the Court to require Enid Cosgriff Murphy to contribute to the financial losses

he incurred during their marriage (T-103). The disposition in the lower court and the relief sought on appeal are set forth on pages 1 and 2 of this Brief.

The essential facts are not in dispute. The Defendant Michael Edward Murphy, prior to his marriage to Enid Cosgriff Murphy in 1964, was a bachelor practicing internal medicine in Salt Lake City (T-82, T-150). Enid Cosgriff Murphy was the widow of the late Walter Cosgriff of Salt Lake City (T-3). At the time of his marriage to Enid Cosgriff Murphy, Michael Edward Murphy was residing in his home on Fortuna Way which he had purchased in May, 1963 (T-81). He also owned a cottage in Brighton Canyon which he had built in 1951. In May of 1963 Michael Edward Murphy inherited a farm in Minnesota consisting of 312 acres (T-81). On January 21, 1964, Michael Edward Murphy and Enid Cosgriff were married and commenced living in Michael Edward Murphy's home on Fortuna Way (T-26). Shortly after the marriage and in concession to the wishes of Mrs. Murphy, improvements were made to the Brighton Canyon cottage (T-100). In 1964 and 1965, prompted by the insistence of Mrs. Murphy, the adjoining lot on Fortuna Way was purchased (T-105). Then, in November of 1966, again upon the initiative of Mrs. Cosgriff, Michael Edward Murphy purchased acreage adjoining his farm in Minnesota, the adjoining acreage being known as the Sullivan farm (T-108). During April or May of 1968, Mrs. Murphy left Dr. Murphy. In June of that year, the Brighton cottage

was sold in order to have enough cash to meet the annual obligations on the Fortuna Way home and the Sullivan farm (T-113, T-176, T-177). In August of 1968, Enid Cosgriff Murphy commenced a divorce proceeding. In October of 1968, while the parties were separated Michael Edward Murphy sold the Fortuna Way home and adjoining lot (T-113). The purpose of the sale was to meet the 1968 payments due on the Sullivan farm and to pay for farm supplies needed for the past growing season all together totalling $15,000.00 to $20,000.00 (T-115, T-176, T-177). Thereafter Michael Edward Murphy moved to the Canyon Crest Apartments in Salt Lake City. In December of 1968, the parties reconciled. In June of 1969, Enid Cosgriff Murphy purchased for Michael Edward Murphy adjoining acreage in Minnesota known as the "Woodlot" which therefore had been known as the Naeseth farm, consisting of about 40 acres. During August of 1969, the parties moved to Minnesota and thereafter, encouraged and prodded by Enid Cosgriff Murphy, various building and remodeling projects were undertaken (T-116, T-129). In September of 1970, Michael Edward Murphy purchased the Cashman farm consisting of 136 acres, (T-170, Exh. 15D). Again, Enid Cosgriff Murphy was interested in this acquisition and was influential in its purchase (T-169, T-170). During June and July of 1971, Enid Cosgriff Murphy went to Europe with her sister and brother-in-law for two months (T-122). After her return in November of 1971, the parties built a manager's home on the original farm, again upon the insistence of

Mrs. Murphy (T-123). In May of 1972, the parties separated (T-11).

At the time of their marriage, Michael Edward Murphy had a net worth of $192,000.00 consisting of cash, his home on Fortuna Way, a cottage in Brighton Canyon, farm acreage and equipment in Minnesota, automobiles, a medical practice and other items (R-50). Mrs. Murphy at that time had a net worth of $1,726,-167.56 (Ex. 2D). About one year after the separation of the parties, Michael Edward Murphy was forced to sell what had begun as his farm and over which Mrs. Cosgriff now held equal control (T-178). He had assets of $80,516.00 consisting of cash and an automobile and liabilities of $22,500.00 consisting of a note payable to Enid Cosgriff Murphy which resulted in a net worth of only $58,010.00. On the other hand, Mrs. Murphy had an increased net worth of $1,946,961.93 (Ex. 4-D).

POINT I

THE TRIAL COURT ERRED IN NOT REQUIRING ENID COSGRIFF MURPHY TO CONTRIBUTE TO THE FINANCIAL LOSS SUSTAINED DURING THE MARRIAGE.

A loss of over $133,000.00 was sustained by Dr. Murphy during his marriage to Enid Cosgriff (R-50). The record is clear as to Enid Cosgriff Murphy's involvement in the transactions that lead to that loss

(T-176, 177). To not require Mrs. Murphy to equally share in the losses sustained was an abuse of discretion on the part of the trial court.

The parties were married on January 23, 1964 (T-2). At the time of the marriage, Dr. Murphy's net worth amounted to approximately $192,000.00 consisting of the following (R-50) (T-81, 82):

Item	*Value*
Cash	$ 15,000.00
Equity in home on Fortuna Way, Salt Lake City, Utah	$ 18,500.00
Brighton Canyon cottage	$ 20,000.00
Farm and equipment in Minnesota inherited by Dr. Murphy free and clear of encumbrances (T-178)	$113,600.00
Two automobiles	$ 6,000.00
Medical practice in Salt Lake City, Utah	$ 15,000.00
Country Club membership and various securities	$ 3,400.00

At the same time, Enid Cosgriff's estate amounted to $1,748,667.56, consisting of the following (R-48) (Exhibit 2-D):

Item	*Value*
Cash	$ 3,828.56
Notes receivable with respect to a golf course	$ 42,500.00
Continental Bank & Trust Company stock	$1,671,695.00
Various other stocks	$ 20,644.00
Car, furniture and other personal effects (Exhibit 2-D) (R-48)	$ 10,000.00

Upon their marriage, the parties lived in Dr. Murphy's home on Fortuna Way (T-26). Within the first year of the marriage, the adjoining lot on Fortuna Way was purchased (T-27, 83) (Exhibits 10-D, 11-D). The acquisition was made at the suggestion and insistence of Enid Cosgriff Murphy (T-27). Her motivation was to build a guest house (T-29). Dr. Murphy was opposed to the purchase and to the proposed building (T-104). Nevertheless the lot was acquired upon Mrs. Murphy's insistence and contribution of a small down payment considering her true financial capacity with the apparent intention to make yearly payments (T-105). But after getting him into the deal, she later refused to meet the yearly obligations thereon (T-113). The guest house was built as Mrs. Murphy desired and was connected to the main house by a bridge and for a time was used as a five-car garage (T-106) (Ex. 10-D, 11-D).

Next came the expansion of the farm operation in Minnesota. In November of 1966, while the parties were still living in Salt Lake City, the Sullivan farm in Minnesota, consisting of approximately 228 acres adjoining the original farm of Dr. Murphy, was purchased (T-47). Mrs. Cosgriff was the driving force behind this acquisition (T-108). She paid $15,000.00 as a down payment with the apparent intention of making the yearly payments of $6,000.00 and renting the farm to Dr. Murphy (T-109).

After separation and initiation of divorce proceedings in 1968, Mrs. Cosgriff told Dr. Murphy that she had no intention of making the $6,000.00 annual payment on the Sullivan farm. In fact, she suggested that Dr. Murphy return the farm to Mr. Sullivan whom she stated would be glad to get it back free (T-113). In an effort to keep the Minnesota operation Dr. Murphy then made the payments. In doing so he had to liquidate his Salt Lake assets for the needed cash (T-176). He first sold the Brighton cottage for $8,000.00 (T-113, 159). Then inasmuch as the annual payments on the Sullivan farm amounted to $6,000.00, with annual purchases of supplies for the farm running $15,000.00 to $20,000.00 (T-115) plus being responsible for the payments on the Fortuna Way complex. Dr. Murphy had no alternative but to liquidate the Fortuna Way properties. It was difficult to find a buyer since the Fortuna Way residence with the substantial additions had become an unusual two-unit complex (T-114). To put the property in a saleable form,

Dr. Murphy converted the complex into two separate units to be sold separately. In doing so, Dr. Murphy found it necessary to use all of the money he received from the sale of the Brighton cottage to cover the remodeling costs (T-114). Money received from the sale was used to pay the 1969 obligation due on the Sullivan farm and the required yearly supplies (T-176).

Had it not been for Mrs. Murphy's determination to purchase the adjoining farm, her default in payment of the obligations in connection therewith, and the obligation on the Fortuna Way guest house and lot, Dr. Murphy would not have had the additional expenses he incurred nor would he have had to sell the Fortuna Way property and the Brighton cottage (T-176, 177).

Acting on her own, Mrs. Murphy in 1969 bought an additional tract of land adjoining the original farm known as the "Wood lot" or Naeseth farm (T-115) (Exhibit 15-D). This land was intended as a gift by Enid Cosgriff Murphy to Dr. Murphy (T-170). She also had a significant influence in the purchase of the Cashman property adjoining the Minnesota farm land (T-170) (Exhibit 15-D) in September, 1969.

Following the various land acquisitions in Minnesota, Mrs. Cosgriff initiated various building projects —the adding of garages (T-129), the addition of a TV library in the original home (T-129), and the putting of a manager's home on the original farm (T-122). The manager's house alone cost $27,500.00 (T-124). In addition, Mrs. Cosgriff initiated a substantial re-

modeling project on the original inherited farm costing some $6,500.00 (T-116). She had a particular purpose in expanding and developing the Minnesota farm. Putting it simply, she apparently wanted nothing less than a well known farm estate. With the acquisition of the Sullivan farm, the 40-acre Wood Lot farm (T-115), the Cashman purchase (T-169, 170), and the manager's home, she was ready to receive guests at her home-farm estate (Exhibit 19-D) (T-128). She persuaded Dr. Murphy to name the entire estate the "Yankee Spy Farms" complete with stationery (Exhibit 18-D), opening social festival (Exhibit 19-D), and name plates on farm trucks (Exhibit 16-D). It was Enid Cosgriff Murphy who initiated the transformation of the farms and remodeling (T-115). In addition she negotiated for all of the remodeling work performed for the Yankee Spy Farms (T-116) (Exhibit 12-D). After the completion of this project, she entertained often and lavishly (T-128).

At Dr. Murphy's request, Enid Cosgriff Murphy maintained the books on the Yankee Spy Farms which she had created, but after eleven or twelve months (T-120) (Exhibit 14-D) lost interest and refused to do this work. This was the way it usually went — even with the farm itself. She enthusiastically engaged on a project involving thousands of dollars—then, after a while, she lost interest and left a "white elephant" on Dr. Murphy's hands. It was now his problem to maintain or dispose of the farm. Neither alternative had any promise. What she considered a gift or benefit to

Dr. Murphy was in reality an accommodation to her own taste and nothing but a financial burden to him (T-176, 177). As a matter of fact, most of the above-mentioned acquisitions and remodeling projects were done without consulting at all with Dr. Murphy (T-129) and without his consent (T-96). Irrespective of whose money was involved, this practice of her obtaining land, building and remodeling without Dr. Murphy's consent or approval evidences Mrs. Murphy's determination to have things her own way regardless of Dr. Murphy's opinion. As a consequence of such domination and independence, Dr. Murphy not only suffered financially but suffered emotionally as well.

When Enid Cosgriff Murphy left Dr. Murphy in 1972, just prior to her filing for divorce, she left him in Minnesota with a huge farm estate which Dr. Murphy was obligated to maintain and pay for or sell (T-176). He had sold his Salt Lake assets to help pay for this financial burden. In addition, through an absence of four years, he had lost the benefit of his reputation and medical practice he had in Salt Lake City. When Enid Cosgriff Murphy left Dr. Murphy, he endeavored to sell the farm complex (T-168). He realized only $77,000.00 net, from the sale (T-171). This amount was far less than the value ($113,600.00) of the farm and equipment he inherited free and clear of debt (T-178) before his marriage to Enid Cosgriff (R-50). Viewing the farm assets alone, Dr. Murphy suffered a loss of $36,600.00. And this loss was attributable largely to Enid Cosgriff Murphy.

In March of 1973, Dr. Murphy's net worth was only $58,010.00 (R-50). When he married Enid Cosgriff, his net worth was $192,000.00 (R-50). Financially because of Enid Cosgriff's active participation in Dr. Murphy's affairs, the marriage resulted in a loss of $133,990.00.

In *MacDonald v. MacDonald*, 120 Utah 573, 236 P. 2d 1066 (1951), this Court referred to *Pinion v. Pinion*, 92 Utah 255, 67 P. 2d 265, and laid down the guidelines for making a proper disposition of property. The first six factors relate to conditions at the time of the marriage:

1. The social position and standard of living of each before marriage: Enid Cosgriff was used to a very high financial and social standard involving lavish entertaining. Dr. Murphy had a few friends, lived rather modestly and was quite unaccustomed to the standard of Mrs. Cosgriff.

2. The respective ages of the parties: He was 46; she was as old or older.

3. What each may have given up for the marriage: Mrs. Cosgriff gave up nothing with respect to wealth. She even refused to give up her Cosgriff name. Dr. Murphy furnished a home for the parties on Fortuna Way, a canyon cottage in Brighton, and the initial Minnesota farm consisting of 312 acres. In addition, his entire earnings throughout the marriage were spent in meeting the ordinary plus the elevated expenditures Mrs. Cosgriff's style of living demanded.

4. What money or property each brought into the marriage: Enid Cosgriff brought approximately 1.7 million dollars which she jealously guarded and kept to herself. Dr. Murphy brought assets into the marriage valued at $192,000.00 to which both had the use of and access to during and throughout the marriage.

5. The physical and mental health of the parties: Both parties were in good health.

6. The relative ability, training and education of the parties: He was a medical doctor with a specialty in internal medicine; she had some experience in the business field and was conspicuously surrounded by advisors.

The following factors are to be considered at the time of the divorce:

7. The time and duration of the marriage: 9 years in this case.

8. The present income of the parties and property acquired during the marriage and owned either jointly or by each: See page 7 hereof and R-52, R-14.

9. How the income and property was acquired and the efforts of each in doing so:

Enid Cosgriff Murphy acquired her income through the assets she inherited from Walter Cosgriff. At the time of the trial, Dr. Murphy's sole income came from a relatively new medical practice in Nevada (T-58). It is to be noted that he had not been accepted there with full hospital privileges (T-60). Mrs. Murphy

sustained no financial loss whatsoever during the marriage. Hers was a gain of approximately $200,000.00. Dr. Murphy's loss was at least $133,990.00.

10. There were no children.

11. The present health of both is good.

12. The present ages are: He is 55; she is *as old* or older.

13. The happiness and pleasure or lack of it experienced during the marriage: There appears to have been few pleasurable moments, the marriage was marked with constant difficulty.

14. Any extraordinary sacrifice: There is no evidence of any sacrifice at all by Mrs. Cosgriff. Dr. Murphy, however, sacrificed greatly in selling his Fortuna Way home, in selling the Brighton cottage, in assuming the payments, maintenance and operation of the Minnesota farm complex created by Mrs. Cosgriff, and by solely absorbing the loss involved in the sale of the Minnesota farm.

15. The present standard of living and needs of each including costs of living: Mrs. Cosgriff's estate at the time of the divorce was approximately 1.9 million (Ex-4-D). Dr. Murphy's was approximately $58,010.00. *He had lost some* $133,990.00 *during the course of the marriage. She had gained about* $200,000.00.

The trial court gave no consideration to the required guidelines set forth in *MacDonald* and *Pinion.*

It was an abuse of discretion to impose on Dr. Murphy the total burden of the losses sustained during the marriage. The decision of the trial court is clearly arbitrary and if allowed to stand would result in manifest injustice. This case is within the parameters of prior cases where this Court has held that the trial court's decree was unfair and inequitable under the circumstances.

In *Martinette v. Martinette*, 8 Ut. 2d 202, 331 P. 2d 821, this Court held that the trial court had abused its discretion in not awarding the husband more in a property settlement and modified the trial court's decree. In facts peculiarly similar to the present case, this Court noted the growing trend of economic independence of women and the impact it was having on marriages. With that in mind, the court stated:

> "It should be kept in mind that the authority from which orders as to alimony, support money, and disposition of property is derived is Sec. 30-3-5, U.C.A. 1953, which provides that when a divorce decree is entered. 'The court may make such orders in relation to the . . . property . . . and the maintenance of the parties . . . as may be equitable. . . .' It is important to note that this statute makes no distinction between the spouses. It does not contemplate, nor should there be, any discrimination or inequality in such awards on the basis of sex. They may be made in favor of either spouse, and should be based upon the needs of the parties and the equities of the situation being dealt with.
>
> "[5] This point of view just expressed is significant here because the plaintiff seems to be

the more aggressive of the two; and certainly is in a better position to fend for herself. Her steady work and the resulting financial independence indicates that she is partaking of the general emancipation of women which has been taking place in various ways in recent years, including their entrance into nearly all fields of endeavor. The resulting self-reliance and release from economic dependence upon husbands had produced its toll in divorces from basically maladjusted and unhappy marriages. Whether this is good or evil, we are not called upon to say. It is simply something which we who administer the law must recognize and deal with under the law as it exists, but always aware that it must be constantly adjusting itself to changing conditions and the needs of society. In cases such as the instant one the ancient idea of the husband as the pater-familias, or the lord and master, is outmoded and unrealistic. It is necessary to so apply the law as to do justice between them on the basis of a realistic appraisal of their circumstances and the problems each must comfort.

* * *

"It seems to us, that he (the husband) is not entirely without justification in regarding the property award as so disproportionate to his desserts that it is poor reward for his long years of effort in contributing to its accumulation." *Id.* at 824.

The prerogatives of the trial court to distribute the property of the parties are acknowledged, but this Court has not hesitated to modify any decree that is inequitable and indicates an abuse of discretion.

In *De Rose v. De Rose*, 19 Ut. 2d 77, 426 P. 2d 221 (1967), this Court said:

> "But this discretion is not without limit, not immune from correction or review if that is warranted. Due to the seriousness of such proceedings and the vital effect they have on people's lives, it is also the responsibility of this Court to carefully survey what is done, and while the determinations of the trial court are given deference and not disturbed lightly, changes should be made if that seems essential to the accomplishment of the desired objectives of the decree; that is, to make such an arrangement of the property and economic resources of the parties that they will have the best possible opportunity to reconstruct their lives on a happy and useful basis for themselves and their children. An important consideration in this regard is the elimination or minimization of potential frictions or difficulties in the future." *Id.* at page 222.

Dr. Murphy is aware that he should bear his share of the loss involved and has never requested otherwise. All he is asking is to be treated equitably. Enid Cosgriff Murphy should be required to share in the disastrous losses sustained during the marriage. The rule established by this Court in *Anderson v. Anderson* 18 Ut. 2d 286, 422 P. 2d 192 (1967), seems appropriate. In that case, this Court affirmed the trial court's decree as to a property settlement, and repected the wife's contention that certain business debts of the parties should be paid by the Defendant's husband out of his earnings and that she should be awarded one-half of all of the property which would remain after

the payment of such obligations. In rejecting that contention, the court stated:

> "It is a novel doctrine that would leave the husband with the accumulated liabilities of 30 years of married life and award to the wife one-half of the net assets free and clear of these debts. Any business venture is accompanied by some risk of failure and to say that because the husband managed these investments, it is his loss, but that she nevertheless will share in the profitable portion of his financial endeavors, is an untenable suggestion. She married him for better or worse. This does not mean the better for her and the worst for him."

The record clearly indicates that Dr. Murphy suffered a substantial loss because of his marriage to Enid Cosgriff. His primary assets of his Fortuna Way home, Brighton cottage and Minnesota farm, lived in, skied from and vacationed at, which were subject to modifications had been lost to him because of the manipulation of Mrs. Murphy. Her primary assets of notes and stocks hidden away in vaults remained intact and were not used during the marriage.

From the analysis of assets of each party and their use during the marriage, it is clear that the trial court abused its discretion in not awarding Dr. Murphy a more equitable property settlement. This Court should reverse the trial court and require Enid Cosgriff to share equally in the losses ($133,990.00) suffered during the marriage, that is, she should be required to contribute (pay to Dr. Murphy) the sum of $66,995.00

plus an additional amount as contended for under Point II of this Brief. Dr. Murphy's promissory note in favor of Enid Cosgriff Murphy in the amount of $22,500.00 should remain cancelled as ordered by the trial court with Enid Cosgriff Murphy to have a credit for that amount leaving a net to be paid of $44,495.00 plus the additional amount as set forth under Point II hereof.

POINT II

THE COURT COMMITTED ERROR IN REJECTING EVIDENCE AS TO THE PROJECTED VALUE OF ASSETS BROUGHT INTO THE MARRIAGE BY DR. MURPHY AS A BASIS FOR DETERMINING HIS REAL LOSS.

Dr. Murphy's net worth at the beginning of the marriage was approximately $192,000.00 (R-50). His net worth when the parties separated was approximately $58,010.00 (R-50). The difference between these two figures represents a loss of $133,990.00 (R-50). But Dr. Murphy's loss was actually much greater than $133,990.00. To determine his real loss, it is necessary to consider what he reasonably might be expected to have had, had it not been for the marriage. His loss must take into account the appreciation he would otherwise have realized on assets he had when the marriage began.

The principal involved is simply this: If one were deprived of a piece of property which five years ago

was worth $10,000.00 but today is worth $20,000.000, then his loss viewed as today is $20,000.00. By the same token, if one were deprived of $10,000.00 five years ago, to be made whole today would not only require the recovery of the $10,000.00 but also interest on the $10,000.00. In either hypothetical, the actual loss involves the intial value plus appreciation or interest, as the case may be. So it is with Dr. Murphy. His loss must take into account the appreciation he would have realized on assets he had when he entered into the marriage with Enid Cosgriff Murphy.

On page 7 of this Brief, the initial assets of Dr. Murphy are itemized. The transactions that followed in the wake of the marriage and Enid Cosgriff Murphy's involvement in those transactions are delineated under Point I of this Brief. In short, Dr. Murphy embarked on the marriage with an established medical practice (T-82), a home on Fortuna Way (T-83), a cottage in Brighton (T-99) and the farm in Minnesota (T-107, 178). With Enid Cosgriff's "help", participation and involvement, he wound up with a "white elephant" farm in Minnesota (T-176).

Dr. Murphy not only lost the value of the properties he had at the time of the marriage, but he also lost their appreciated value as of the time the marriage ended.

The interrogation of Dr. Murphy at the trial of the case, objections made, the action of the Court with respect to evidence bearing on the present value of

assets brought into the marriage by Dr. Murphy and offers of proof appear on Pages 132-149 of the transcript, pertinent extracts being set forth in the Appendix to this Brief.

Evidence rejected by the Court would have established that the Fortuna Way property that was sold for $53,000.00 in 1968 (T-158) would have been worth $60,000.00 to Dr. Murphy at the time of the divorce (T-149). Likewise, the Brighton cabin had a value at the time of the divorce of approximately $28,000.00 as contrasted with the $8,000.00 for which it was sold for in 1968 (T-159).

With respect to the Minnesota farm, Dr. Murphy suffered a substantial loss on that sale. When the parties married, the total net value of the farm, equipment, buildings, and the 312 acres of the original inherited farm in 1964 was $113,600.00. At the time of the sale in 1973. Dr. Murphy received less for the then 716 acres than the 1964 value of his original farm. The total sale price of the farm equipment, buildings, and the 716 acres of land was $280,000.00 from which Dr. Murphy netted only $77,000.00 (T-171). Evidence rejected by the trial court would have established that the Minnesota farm property from which Dr. Murphy netted $77,000.00 would have been worth $187,200.00 for the 312 original acres at the time of the divorce or a loss of $110,200.00.

In sustaining the objection as to materiality and relevancy, the court erred. The proffered evidence

would have tended to establish the actual loss. The values of the property involved at the time of the divorce were not speculative. Furthermore, it can be said with reasonable certainty that he would have had those properties had it not been for his marriage to Mrs. Cosgriff and what happened during the course of the marriage. The weight of the evidence would have been a matter for the court to have considered, but certainly it should not have been rejected as being speculative.

The claim for contribution is one of the major claims of this action. The facts tending to prove the loss suffered and the value of the loss to Dr. Murphy are therefore material to this claim. Evidence establishing a material fact is relevant and should be admitted, *Simpson v. General Motor Corp.*, 24 Ut. 2d 301, 470 P. 2d 399 (1970). Furthermore, the valuation of property awarded in a divorce case is a material and ultimate fact, *Wold v. Wold*, 7 Wash. App. 872, 50 3 P. 2d 118 (1972). McCormick states that the most acceptable test of relevancy is the question "Does the evidence offered render the desired inference more probable than it would be without the evidence?", *McCormic on Evidence*, p. 437. With respect to divorce actions, even greater liberalities should be extended to the admission of testimony than in litigation generally, *Dursa v. Dursa*, 78 Ohio L. Abs. 498, 150 N.E.2d 306 (1958) Under these tests, it is clear that the offered evidence was relevant in that it related to Dr. Murphy's true loss.

Not only was the offered evidence relevant, but Dr. Murphy was a proper witness to be asked these questions. The information was solely within his knowledge. The testimony sought would have intended to establish the element of a claim for contribution to losses sustained during and because of the marriage. He was not asked to testify as to the value of the loss sustained, but only as to whether, but for his marriage to Enid Cosgriff, he would have sold the various properties. Such testimony is relevant to the issue of his loss.

With respect to the opinion of Dr. Murphy as to the value of his land, it is a well-established rule of law in Utah that an owner of real property is a proper witness to testify as to his opinion of the value of his land, *Provo River Water User's v. Carson*, 133 P. 2d 777; *State v. Dillree*, 25 Ut. 2d 184, 478 P. 2d 507. An owner may also testify as to the value of the improvements on land. A general statement of this proposition is found in 32 C.J.S. 546 (120), P. 472; See also *Mosher v. Lack*, 41 Cal. App. 23, 181 P. 813. The witness was therefore qualified to give his opinion. If the Court had received the same, it would have tended to establish the true loss sustained to Dr. Murphy. Accordingly, on this ground, the case should be reversed and remanded to the trial court to hear evidence that it rejected and in the light thereof evaluate the true loss as sustained by Dr. Murphy.

POINT III

THE COURT ERRED IN DENYING MICHAEL EDWARD MURPHY'S MOTION TO AMEND THE PRAYER OF HIS COUNTERCLAIM TO SEEK EQUITABLE CONTRIBUTION TO THE FINANCIAL LOSS SUSTAINED DURING THE COURSE OF THE MARRIAGE.

During the course of the trial, counsel for the Defendant moved the Court to amend the prayer of the Counterclaim to request that Enid Cosgriff Murphy contribute an amount equal to one-half of the overall loss sustained during the course of the marriage (T-103). The court denied the Motion (T-103). The Motion was prompted by Plaintiff's objection to testimony the Defendant was seeking to elicit (T-102). The Defendant had already introduced evidence of Mrs. Cosgriff's involvement in various land purchases and developments showing the relationship between her actions and losses sustained (T-27, 90-91, 99). Counsel for Mrs. Murphy objected to questions which would have elicited further evidence going to those losses (T-102). The basis for Plaintiff's objection was that the evidence being sought was at variance with the prayer of the Counterclaim and not justified under the rules (T-102).

This Court will note that the Counterclaim (R-4) requested that because of Mrs. Cosgriff's action she be required to make certain payments and also sought

"such other and further relief as the Court may deem proper" (R-6).

Inasmuch as the status of the property had changed following the date of the filing of the Counterclaim (R-59) and to remove any question as to the scope of the prayer of the Counterclaim, counsel for the Defendant moved the Court to amend to specifically demand that Mrs. Murphy contribute an amount equal to one-half of the overall loss sustained during the course of the marriage (T-103).

The Defendant contends that the prayer of his Counterclaim was already sufficiently broad to allow the trial court to require Mrs. Murphy to contribute to one-half of the loss sustained. However, in view of the trial court's denial of the Motion to Amend and in view of the court's failure to require Mrs. Murphy to contribute to the loss sustained, the trial court's ruling on the Motion to Amend the Prayer of the Complaint becomes most significant.

It is now unclear whether or not the trial court's refusal to require any financial contribution on the part of Mrs. Cosgriff was prompted by the equities of the case or what the court considered a too restrictive Counterclaim demand which the court was unwilling to amend.

If the prayer of the Complaint was already sufficiently broad, then the amendment, though technically unnecessary, would have removed any question and would have been harmless. On the other hand, if the

prayer of the Counterclaim needed to be more specific, then it was a flagrant abuse of discretion to deny the amendment and create a technical basis for doing less than equity requires in the case.

It is the Defendant's position that the prayer of the Counterclaim was sufficient and that the Court could well have required contribution. However, as indicated, having made the Motion to Amend which was denied there arises an uncertainty as to the relationship of that denial and the unwillingness of the Court to require a contribution by Mrs. Murphy to the financial losses sustained.

Certainly the question of whether or not Enid Cosgriff Murphy should contribute to the losses sustained ought not to turn on any technical question of whether or not the prayer of the Counterclaim was sufficiently broad. In view of our rules of civil procedure allowing amendment, no trial court ought to deny a Motion to Amend a Counterclaim in circumstances such as those in the instant case—and certainly not as a technical basis for precluding a contribution. The question of whether or not Mrs. Murphy ought to contribute to the losses sustained ought to turn on the existing equities which demand that she should.

It is a well-established rule of law that when evidence has been introduced with respect to a material fact in question, an amendment to conform to such proof is appropriate, 71 C.J.S. 285, P. 612; recognized in Utah, *Newton v. Tracy Loan & Trust Co.*, 88 Utah 547,

40 P. 2d 204; *In Re: Bundy's Estate*, 21 Utah 299, 241 P. 2d 462. Furthermore, Rule 15 (b) of the Utah Rules of Civil Procedure was an ample basis for allowing the amendment.

In addition, the Motion to Amend neither constituted a variance with the original Counterclaim nor was it a wholly different cause of action. It was only made as a means of amplification and elaboration of matters stated in the original Counterclaim. Amendments sought to clarify a cause of action of an original pleading and which are germane thereto, have been held by this court to not constitute new matters and not at variance with the original pleadings, *Crane v. Crane*, 102 Utah 411, 131 P.2d 1022; *Hartford Accident and Indemnity Co. v. Clegg*, 103 Utah 414, 135 P.2d 919; *Graham v. Street*, 109 Utah 460, 166 P.2d 524. The rule established in *Wells v. Wells*, 2 U. 2d 241, 272 P.2d 167 is particularly in point.

> ". . . the test is not whether under technical rules of pleading a new cause of action is introduced, but rather the test is whether a wholly different cause of action or legal obligation is introduced; that is, an amendment will be allowed if a change is not made in the liability sought to be enforced against the defendant." *Id.* at 170.

In this case, no "wholly different cause of action" or "legal obligation" was introduced, nor was a change made in the liability sought to be enforced against Mrs. Murphy in the amended Counterclaim. The original pleadings contemplated contribution and the amend-

ment merely amplified and more clearly defined what the original counterclaim intended.

This Court should hold that the prayer of the Complaint seeking "such other and further relief as the Court may deem proper," is sufficient to require Enid Cosgriff Murphy to contribute to one-half of the losses sustained during the marriage. If this Court should hold that such a prayer for relief is not sufficient to require Enid Cosgriff Murphy to contribute to one-half of the losses sustained, then the trial court should be reversed and the defendant's Motion to Amend allowed to the end that the matter of contribution to the losses sustained will turn on the equities involved and not on the technical form of a prayer for relief.

POINT IV

THE COURT COMMITTED ERROR IN NOT AWARDING THE DECREE OF DIVORCE TO DR. MICHAEL MURPHY OR AT LEAST GRANTING HIM A DIVORCE AS WELL AS TO ENID COSGRIFF.

The Court's attention is invited to the testimony of Enid Cosgriff Murphy with respect to her alleged grounds for divorce found on pages 3 through 15 of the record. In vague, general terms, lacking in specificity, gravity and recency, she referred to Dr. Murphy's "criticisms" (T-7). Indeed her testimony, for the more part, amounts to nothing more than her own conclusions.

It should be pointed out that the parties separated from September to December in 1968 (T-9). With much of her testimony with respect to grounds, there is no indication whether what Enid Cosgriff Murphy was complaining about was before or after they separated.

She complained that following the reconciliation some portion of his prior conduct began again (T-10). but there is nothing to indicate exactly what it was or when it took place (T-10). She testified that, "those actions and statements and attitudes" continued in late March, April or May of 1972, but this vague conclusion is totally lacking in specificity as to what "actions," what "statements," and what "attitudes" were involved (T-11).

Mrs. Murphy complained of Dr. Murphy's being critical of certain "fiction" which Dr. Murphy allegedly referred to as "Enid's trash" (T-12), but there is nothing to indicate specifically what happened, what was involved, or whether it occurred before or after the parties reconciled. As far as this record is concerned, there is nothing to show that any criticism of Mrs. Murphy's reading occurred following the reconciliation.

There is also some general complaint that Dr. Murphy "criticized" her "loyalty to the business advisors who might have inherited along with the property from Walter Cosgriff with a blind loyalty and that I didn't analyze them. . . ." (T-13). This all appears to have taken place prior to the reconciliation.

Then counsel for Enid Cosgriff Murphy finally asked, "Now tell us, if you will, what effect this conduct that you have mentioned by the Defendant, what effect did that have on you?" There is no indication in the record of what conduct was being referred to (T-13).

Apparently the event that caused Mrs. Murphy to leave Dr. Murphy was an episode involving a water heater (T-11, 12, 14). There is no indication of what Dr. Murphy did. All Mrs. Murphy states is the he created a "very bad scene over the malfunction of the water heater" (T-12) or "created a scene" (T-14). It is the court's function and not Mrs. Murphy's to draw conclusions.

General assertions of misconduct in the absence of direct proof are of insufficient probitive value to warrent a divorce for mental cruelty. A general statement of this proposition of law is found in 27A C.J.S. 143 (3)e, P. 527. This court adhered to this general principle in *Hyrup v. Hyrup*, 66 Utah 580, 245 P. 335 where it told that:

> "Courts are not authorized to grant divorces except for the particular causes prescribed by law, and then only when the grounds or cause for divorce is proved by substantial and satisfactory evidence."

Mrs. Murphy's testimony is simply insufficient to sustain a Decree of Divorce in her favor.

The real problem in this marriage was that of which Dr. Murphy complained (R-5). From the out-

set Mrs. Murphy was neither committed to the marriage nor to Dr. Murphy (T-72). Mrs. Murphy was wrapped up in the preservation and perpetuation of the Cosgriff name, fame and fortune. The background of what happened following Mr. Cosgriff's death and continuing after Enid Cosgriff's marriage to Dr. Murphy is reflected in her own testimony (T-15, 20) and Dr. Murphy's testimony (T-68).

Enid Cosgriff Murphy admitted on cross-examination that she may have told Dr. Murphy, prior to the marriage, that she was fatigued and intended to completely retire from public service and public life after ". . . completion of the baseball venture" (T-22), but this she did not do. What Enid Cosgriff did after the marriage constituted ample grounds for divorce in favor of Dr. Murphy. Mrs. Cosgriff was never really Dr. Murphy's wife. As a matter of fact, she constantly preferred being referred to as Mrs. Enid Cosgriff rather than Mrs. Murphy. She admitted that she continued using the name Cosgriff well after her marriage to Dr. Murphy (T-16). The reason that she gave was that the name "Cosgriff" had become well known throughout Utah. She implied that it was necessary to keep the name in order to keep the sports contacts necessary for the operation of the Salt Lake Bees Baseball team with which she had become affiliated (T-16). But her involvement terminated shortly after she married Dr. Murphy (T-16). However, rather than give up the name Cosgriff and assume the name Murphy for all purposes, she persisted in the continued use of

the Cosgriff name (T-18). This had an obvious demoralizing effect on Dr. Murphy (T-79). He felt that he was losing his own personality (T-79). Dr. Murphy assumed at the outset of the marriage that Enid Cosgriff would assume the Murphy name and be his wife (T-70).

Even after they moved to Minnesota where the Cosgriff name had no significance whatsoever, Mrs. Murphy persisted in using the Cosgriff name (T-71, 72). There is nothing to refute Dr. Murphy's testimony that throughout his marriage, he felt he was never married to Mrs. Cosgriff. She remained Mrs. Walter Cosgriff from the day he married her until the day she left (T-96).

Typical of Mrs. Murphy's obsession with the Cosgriff name, fame and fortune was the "golf shrine" located at a residence of Mrs. Murphy kept at 401 11th Avenue (T-29) (Exhibits 6-P, 7-P, 8-D). On their seventh anniversary in 1971, a party was given by Mrs. Cosgriff at the 11th Avenue home (T-91). Some 150 people were present (T-91). Located in a conspicuous display was a golf shrine exhibiting the golf trophies of her former husband, Walter Cosgriff (Exhibits 7-P and 8-D). During the course of the party, many of the guests passed by the schrine with statements being made to Dr. Murphy such as: "Michael, rather than marriage, this is an imitation. Why aren't some of your ski trophies in this display?" (T-92). It is obvious that the golf shrine had a demoralizing effect on Dr.

Murphy and tended to relegate him to something less than a husband of Mrs. Cosgriff.

Mrs. Cosgriff was often critical of Dr. Murphy's family. On one particular occasion, Mrs. Cosgriff told Dr. Murphy's sister-in-law who was staying with the Murphy's in Minnesota that the sister-in-law was destroying the evening and that it was impossible to carry on a conversation with her (T-76). Dr. Murphy's family refused to come again after this incident. On another occasion in front of Dr. Murphy's two neices, Mrs. Cosgriff stormed out of the house while they were having a discussion with Dr. Murphy and Mrs. Cosgriff (T-77). On another occasion in Minnesota, in approximately January of 1972, Dr. Murphy and Mrs. Cosgriff had given several parties and after one particular party, Mrs. Cosgriff carried on by screaming, shouting, slamming doors and stamping her feet, all of which Dr. Murphy was not prepared for and caused him great anxiety (T-79).

Mrs. Cosgriff never consulted Dr. Murphy about financial matters. She would always discuss these matters with her attorneys and would never involve Dr. Murphy. As a result, Dr. Murphy felt more of an adversary to her and her lawyers than he did a husband (T-96, 97). This process of consulting attorneys without Dr. Murphy's knowledge continued even after the parties moved to Minnesota (T-97).

Mrs. Cosgriff also took extended trips abroad without Dr. Murphy. After persuading Dr. Murphy

to move to Minnesota, Mrs. Murphy told Dr. Murphy that she did not intend to stay there (T-74). She described Minnesota as a dreadful place and promptly left for Europe with her sister and brother-in-law (T-74). Dr. Murphy was then alone to run the farm Mrs. Murphy had moved him on to without any assistance from her.

The right of a husband to have a Decree of Divorce is well established, Section 30-3-2, Utah Code Annotated (1953). Older case law has held that in order for the husband to secure a divorce on the grounds of mental cruelty, aggravated grounds must be shown, *Doe v. Doe*, 48 Utah 200, 158 Pac. 781; *Schuster v. Schuster*, 88 Utah 257, 53 P. 2d 428. The reason given for this in *Alldredge v. Alldredge*, 119 Ut. 2d 504, 229 P. 2d 681, was that:

> "The woman is more sensitive than the man and that she is not so much inured to life's buffetings; hence, that acts and conduct on the part of a husband may well constitute cruelty to the wife, causing her great mental distress when similar acts and conduct on her part may not constitute cruelty to him or cause him great mental distress." *Id.* at 663

However, the court implied that this rule may not be applicable, "in this non-chivalrous age of economic equality of the sexes and the wife's emergence from the home into the business and professional realms." *Id.* at 663. In that case, the court upheld the Decree of Divorce in the husband's favor in view of the wife's conduct in allowing numerous parties in the home. It

should be noted that the standard of allowing the wife a divorce for mental cruelty on less provocation than the husband has been modified elsewhere where facts present a stronger case for the husband, *Woolley v. Woolley*, 113 Utah 391, 195 P.2d 743.

The present case involves facts that fall within the language of *Alldredge, supra.* Mrs. Cosgriff is a financially independent person. Her wealth had made her very independent of Dr. Murphy. The rule of requiring the husband to adduce evidence showing aggravated mental cruelty as *Doe* and *Schuster*, supra, is plainly not applicable here. She was used to the buffetings of life and was emotionally equipped to meet them. Under this theory, the evidence she produced of mental cruelty by Dr. Murphy is insufficient.

Under the established law of this State, Dr. Murphy's assertions of mental cruelty have been substantiated. The evidence was ample to allow the court to grant the divorce to Dr. Murphy. This Court has held that where the husband has established facts indicating mental cruelty by the wife, the husband should be awarded the divorce, *Griffiths v. Griffiths*, 3 Ut. 2d 82 278 P.2d 983 (1955). In that case, evidence indicated that the wife constantly nagged the husband causing frequent separations between them, not unlike the present case.

If the Court believes Mrs. Cosgriff has established sufficient evidence establishing mental cruelty, then this court should award the divorce to both parties.

This rule of granting each the divorce is well established in the Utah law. In *Sartain v. Sartain*, 15 Ut. 2d 98, 389 P. 2d 1023 (1964), Justice Henriod in a concurring opinion stated:

> "From the record, I cannot see where the defendant was pearly white and plaintiff only pearly gray-white or where plaintiff shouted too loudly but defendant less audibly. I believe this is a case where each and both parties should have been granted a divorce, in that the *Hendricks* case should be tempered where the acts of cruelty approach a clash in the middle of the domestic spectroscope. I think the case well might have been resolved by granting to each of the litigants a divorce, which might be helpful, but hardly harmful to anyone that this issue was not urged on appeal." Id. at 1023.

This Court has also reiterated this rule in *Mullins v. Mullins*, 26 Ut. 2d 82, 485 P. 2d 663 (1971) where Section 30-3-2, Utah Code Annotated (1953) was interpreted. This Court held that the trial court was in error in not awarding both sides a Decree of Divorce where both were equally at fault.

Accordingly, on the record of this case, it was Dr. Murphy who had grounds for divorce and not Enid Mosgriff Murphy. It was an abuse of discretion for the trial court to award the Decree of Divorce to Mrs. Murphy and ignore Dr. Murphy's grounds. And even if this court holds that Mrs. Murphy's "grounds" were inadequate, then it should award a Decree of Divorce to Dr. Murphy also under the established law of this State

as noted above or remanded the case to the trial court with directions to also grant Dr. Murphy a Decree of Divorce.

CONCLUSION

The decision of the trial court should be reversed and Enid Cosgriff Murphy should be required to contribute an amount equal to one-half of the losses sustained (based on evidence received by the Court) by paying to Dr. Murphy the sum of $44,495.00, the same being one-half of the total loss sustained. This is in accordance with the argument under Point I hereof and gives credit for the cancelled Promissory Note.

In addition, the true loss sustained by Dr. Murphy should be determined and accordingly, the case should be remanded to the trial court to receive additional evidence on the present value of assets initially brought into the marriage by Dr. Murphy as a base for determining his real loss as urged in Point II hereof. That is, on remand to the trial court, current values must be determined of assets initially owned by Dr. Murphy, which assets he would reasonably been expected to own at the time of the divorce except for his marriage to Enid Cosgriff. The difference between his initial net worth and ending net worth (taking into account the appreciated value of assets initially owned) represents his true loss and the Court should have received evidence of the same.

Consistent with the argument under Point III, this ourt should rule that the prayer for relief in the Coun-erclaim seeking "such other and further relief as the ourt may deem proper," is sufficiently broad to re-uire a contribution to losses on the part of Enid Cos-riff Murphy. If this Court rules otherwise, then this ;ourt should reverse the trial court and its denial of he amendment moved for and allow the amendment to he prayer of the Counterclaim to specifically require contribution to losses.

In addition, as argued under Point IV hereof, this ;ourt should reverse the trial court and hold that Enid ;osgriff Murphy has not sustained her burden of prov-ng grounds for divorce and accordingly, this Court hould award the divorce to Dr. Murphy. In the event his Court holds that the evidence is sufficient to sus-ain the trial court's award of a Decree of Divorce to Enid Cosgriff Murphy, then this Court should also ward a Decree of Divorce to Dr. Murphy or in the lternative, remand the case to the trial court with irections to the trial court to enter a Decree of Di-orce in his favor as well as to Mrs. Murphy.

As this Court eloquently stated in the divorce ac-ion of *Anderson v. Anderson*, 18 Ut. 2d 286, 422 P. d 192, 194:

> "Any business venture is accompanied by some risk of failure and to say that because a husband managed these investments, it is his loss but that she will nevertheless share in the profitable por-tion of his financial endeavors, is an untenable

suggestion. *She married him for 'better or worse.' This does not mean the 'better' for her and the 'worse' for him.*" (emphasis added)

The instant case is even stronger than the *Anderson* case, where in the instant case the record shows that Enid Cosgriff Murphy was the real driving force and "manager" that led to the disastrous losses incurred.

Respectfully submitted.

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APPENDIX

The interrogation of Dr. Murphy at the trial of ıe case, objections made, the action of the Court with ːspect to the evidence bearing on the present value of ıe assets brought into the marriage by Dr. Murphy ıd offers of proof are as follows:

(T-132) MR. McMURRAY: . . . What value do you place on that, or did you place on that initial farm at the time of your separation when you owned the property?

MR. SNOW: Object this as completely immaterial and irrelevant.

(T-139) THE COURT: Well, I think the way the question was phrased, that it is objectionable.

* * *

MR. McMURRAY: I have in mind, Dr. Murphy, the 312 acres which you inherited. I have in mind the improvements which were on the property when you entered into this marriage.. I have in mind any maintenance that might have been done. Obviously, you kept it up. I understand that. Now, if there were additional items purchased additional improvements made, and I thing you have testified there may have been some; I'm not asking that. You can exclude those. That would reduce any figure that you can exclude those. That would reduce any figure that you would have in mind. I have in mind simply what you started out with as to that initial acreage with the improvements that were then on it as they had been maintained up to the time you sold it, and I want you to tell

the Court what you valued it at, or would value it at as an owner.

(T-140) MR. SNOW: Objection. There's still no foundation for that.

THE COURT: The objection will be sustained.

* * *

(T-140) MR. McMURRAY: Comes now the defendant in this case by and through his attorney and makes this offer of proof with respect to the matter which there has just been some discussion about. May the record show that if Dr. Murphy were permitted to testify on this matter, he would do so as an owner of the property that he is being interrogated about, that is, he owned it at the time that I am asking him to give a value, and that his testimony would be that a fair value for the property would be $600.00 per acre; that the $600.00 per acre would be a figure which would cover the home that was initially there and the improvements that were initially there as they have been maintained over the period of time up until the time that Mrs. Cosgriff left, and that that $600.00 per acre would exclude additional improvements that might have been made and were made, or any other buildings or expansion projects which were not a part of the acreage when he entered into the marriage, and that accordingly, the value of the farm acreage at that time that I am inquiring about would be according to my calculations $600.00 per acre for 312 acres, for a total of $187,200.00 as representing Dr. Murphy's opinion as to the value of the property at the time indicated.

(T-145) MR .McMURRAY: Now, Dr. Murphy, if you had not married Enid Cosgriff, can you state with reasonable certainty whether or not you would have continued your medical practice here in Salt Lake City?

MR. SNOW: Objection. Objected to as immaterial and irrelevant. They did get married, and he was a grown man at the time.

THE COURT: Sustained.

* * *

(T-145) MR. McMURRAY: The defendant acting by and through his counsel now makes this offer of proof, that had it not been for the marriage to Enid Cosgriff, that he would state with reasonable probability that there was nothing that would indicate that he should leave this area. that he would still be practicing medicine in his field of specialty here in Salt Lake City.

(T-145) MR. McMURRAY: Dr. Murphy, can you state with reasonable certainty if it hadn't have been for your marriage to Enid Cosgriff whether or not you would still be owing the basic acreage which you inherited in Minnesota, the 312 acres, the Brighton property that you had described, the cottage, the canyon property, and the house on Fortuna Way?

MR. SNOW: Objection. Objected to, Your Honor, for the reasons previously stated, and also because it's pure speculation. It's totally irrelevant and immaterial to the issues in this case.

THE COURT: Sustained.

(T-146) MR. McMURRAY: The defendant by and through his counsel makes this offer of

proof, and if permitted to testify, the defendant would testify in substance that were it not for the marriage to Enid Cosgriff that he believes with reasonable probability that he would still own the basic acreage that he had inherited in Minnesota, the 312 acres, that it is doubtful that he would have acquired any other additional acreage surrounding it, that he would still have the canyon property in Brighton, and that he would still have the home and residence on Fortuna Way.

* * *

(T-148) MR. McMURRAY: May the record show that we have had a discussion in chambers, and that I have considered with the Court and with counsel the calling of Mr. Sterling Webber, who I will represent to the Court is a qualified real estate appraiser, and have indicated to the Court my desire to call him to testify as to the present values of the home on Fortuna Way and the present value of the Brighton cabin property, which would include the acreage and the cabin, and that I understand that there would be an objection made to my calling — an objection made on the part of Mr. Snow to his so testifying, and I understand that the Court would sustain that objection, and I would, therefore, proceed with an offer of proof, if that correctly represents our understanding.

* * *

(T-148) MR. McMURRAY: The defendant. Dr. Michael E. Murphy, acting by and through his counsel, makes this offer of proof, that if Mr. Sterling Webber were called and permitted to testify, that he would testify first as to his qualifications as a real estate appraiser in our area,

that he would testify extensively as to those qualifications, and that he had gone to the home on Fortuna Way which has been identified in this proceeding which was the home that was occupied by Dr. Murphy at the time that he married Enid Cosgriff; that he would testify as to his appraisal of the property, his evaluation, his going upon it, and that he has made a thorough appraisal report, and that the value of the property today would be $64,800.00, provided, however, that there is a kitchen improvement in the property of $4,000.00, which was made by the subsequent owner and/or occupant of the property, which was not made, of course, by Dr. Murphy; and therefore, the value of the lot and the home as Dr. Murphy occupied it on today's market would be $60,800.00. Is that correct? $60,800.00. With respect to the Brighton cabin property, if Mr. Webber were permitted to testify, he would testify that he did go, that he has gone to the cabin property, appraised it, and that in his opinion the fair market value of the Brighton cabin property as identified in this proceeding, and which Dr. Murphy owned at the time he entered into this marriage with Enid Cosgriff, that was subsequently sold, that its' value today would be $28,000.00; that the property would actually have a value of $31,000.00, except for the impact of an existing zoning ordinance which he feels has diminished that value by $4,000.00 leaving a value of that property on today's market at $28,000.00. That would be sufficient on that offer of proof, Your Honor.

(T-149) THE COURT: I suppose you have an objection to that testimony being offered?

MR. SNOW: I would object to it, that the

present value of that property would be totally irrelevant, immaterial, and outside the issues of this case.

THE COURT: Your objection will be sustained. Do you have other questions of the doctor?